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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re)	Chapter 7
EDWARD J. BALL, JR.,)	Case No. 03-14674-GBN
Debtor.)	ORDER
_____)	

The debtor has authored a pleading seeking the court’s recusal from his case and related adversaries and removal as a United States Bankruptcy Judge. This order will endeavor to deal only with the recusal request.¹

Recusal is justified either by actual bias or the appearance of bias, measured by whether a reasonable person with knowledge of all the facts would conclude the judge’s impartiality might reasonably be questioned. 28 U.S.C. §455(a). Judicial rulings and remarks not based on an extrajudicial source almost never constitute a valid basis for recusal. Fundamentally it is a question of degree. Disqualification is warranted only when judicial rulings and remarks, not based on extrajudicial sources, rise to such a high degree of favoritism or antagonism as to make fair judgment impossible. *In re Fraschilla*, 235 B.R.449, 459 (9th Cir. Bankr. 1999), *aff’d*

¹As to the latter demand, for the record, the undersigned will refuse to fire himself. This aspect of the caption reads: “REMOVAL OF JUDGE GEORGE B. NIELSEN AS FEDERAL BANKRUPTCY JUDGE FOR CONSPIRACY, FRAUD, MAIL FRAUD, WIRE FRAUD, PERJURY, BIAS, UNPROFESSIONAL CONDUCT, FAILING TO REPORT FELONIES AS REQUIRED BY LAW, VIOLATION OF CIVIL RIGHTS, HOBBS ACT VIOLATIONS, AND A RICCO ENTERPRISE DIRECTED AND ENCOURAGED BY MR. NIELSEN.” Pleading *id.* at p.1.

1 242 F. 3d 381 (9th Cir. 2000), citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147,
2 1157 (1994).

3 When reviewing bankruptcy judge denials of recusal motions, appellate courts
4 test whether a reasonable person with knowledge of all the facts would conclude the judge's
5 impartiality might reasonably be questioned. *In re Focus Media, Inc.*, 378 F.3d 916, 929 (9th Cir.
6 2004). In explaining the extrajudicial source doctrine, the Supreme Court noted:

7 First, judicial rulings alone almost never constitute
8 a valid basis for a bias or partiality motion....
9 Second, opinions formed by the judge on the basis
10 of facts introduced or events occurring in the
11 course of the current proceedings, or of prior
12 proceedings, do not constitute a basis for a bias or
13 partiality motion unless they display a deep-seated
14 favoritism or antagonism that would make fair
15 judgment impossible.
16 *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157.

17 There is no impartially, favoritism or antagonism when the trial judge requires
18 competent, admissible evidence that is probative of the essential elements of the requested relief
19 from the party. *Fraschilla*, 235 B.R. at 459-60.

20 In the present case, debtor is not demanding recusal based on an extrajudicial
21 source. Instead, the pleading targets trial court rulings. Given that judicial rulings alone seldom
22 constitute a valid basis for a bias motion, debtor bears a heavy burden in establishing a deep
23 seated, unequivocal antagonism that makes fair judgment impossible. *Liteky*, *id.*

24 THE EXECUTORY LEASE AND DEBTOR'S SCHEDULES

25 First, under a "conspiracy" and "perjury" rubric, debtor cites a December 16,
26 2004 order denying reconsideration of an order rejecting a lease. The nonresidential leasehold
27 was located in Oxnard, California. Order at administrative docket item ("dkt.") 167. The landlord
28 filed a motion for the bankruptcy estate to either assume or reject the lease. As the order notes,
during the December 6, 2004 hearing, the trustee and the landlord agreed the lease should be
rejected and the automatic stay lifted to allow the landlord to recover the premises. Debtor's only
option, if he wished to preserve the lease for his own private benefit, was to negotiate an

1 arrangement with his landlord. *Id.* at p. 2. Instead debtor filed a motion for reconsideration. Dkt.
2 166.

3 In denying reconsideration, this court observed:

4 Debtor's reconsideration motion again invokes
5 allegations of trustee mismanagement. This blame
6 game doesn't work. First, it's not at all clear that
7 the trustee is at fault regarding the lease. Debtor
8 had a legal obligation to file complete and accurate
9 schedules, including identifying all unexpired
10 leases in Schedule G. 11 U.S.C. section 521(1).
11 Order at dkt. 167, p. 2.

12 The court continued:

13 Identification of unexpired non-residential leases
14 is particularly important. Debtors and trustees have
15 only 60 days from the bankruptcy filing to move to
16 assume such contracts. Failing to timely assume
17 results in the lease being deemed rejected. The
18 premises are then to be immediately returned to the
19 lessor.... The trustee was not appointed until
20 September 24, 2003, with less than 30 days
21 remaining to assume. Dkt. 16. It's unclear if the
22 trustee had knowledge of the existence of the lease
23 in the remaining time. It is also unclear, assuming
24 the trustee had knowledge, whether he had the
25 resources to assume the lease by promptly curing
26 all arrearages, as the law requires....

27 It is clear however, that debtor knew of the
28 lease, as he was occupying the premises and
paying the rent. Neither he nor the trustee
attempted
to timely assume. It's unknown whether anyone is
at fault in the lease rejection. If there is someone to
blame, as debtor wants to believe, this doesn't
prevent rejection. No one timely assumed. The law
says the lease is rejected.... Debtor's motion is
denied. *Id.*, at pgs. 2-3 (footnote omitted).

According to the debtor the above statement in the order is pure fabrication and
contradictory to "the evidence." Motion at p. 6. Debtor's "evidence" is contained in pgs. 8-16,
id. His argument appears to be that his partial filings of documents and discussions with the
trustee should have provided sufficient hints to encourage the trustee to mount an investigation
to determine whether there were executory leases in existence, whose assumption would benefit

1 estate creditors. Pgs. 13-16, *id.* It is unusual to require trustees to make such a search. Executory
2 contracts and leases are to be specifically identified in Schedule G at the very inception of the
3 case. 11 U.S.C. §521 (1), Official Bankruptcy Form Six at Schedule G.

4 Any required lease investigation, of course, must have concluded in the first 30
5 days after the trustee's appointment, as that was the time left to assume. 11 U.S.C. §365 (d) (4).
6 Debtor undercuts his own argument by incorrectly claiming "...debtor listed the lease as an
7 executory contract in Schedule G, just as the law required." P. 16. Obviously, had debtor timely
8 filed a properly completed Schedule G, identifying an unexpired lease, the trustee would not have
9 to conduct an investigation to determine if any existed. But debtor did no such thing. It was the
10 **trustee** who identified the lease in the trustee's Schedule G, filed December 3, 2003, well after
11 the assumption period had run. Dkt. 54 at schedule G. This fact was previously directed to
12 debtor's attention in the order of December 16, 2004. *See* dkt. 167 at p. 3, fn.1. The court also
13 made debtor aware of this fact at the hearing on December 6, 2004. Minutes of hearing at p. 2,
14 dkt. 161.

15 The lease was deemed rejected when no one moved to assume it in the first 60
16 days of the case. Debtor himself recognizes this: "And if executory, it expired when your wonder
17 boy did not assume in the first sixty days² (see In Cochise College Park, 703 F.2d 1339." [*sic*],
18 P. 15 *id.* Since no one timely assumed, the court was required to deem the lease rejected and deny
19 debtor's motion for reconsideration.

20 To state in connection with this ruling, that debtor did not comply with his duty
21 to file schedules is not bias. It is a fact. Debtor's failure to file complete schedules and statements
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23
24 ²If debtor is referring to the trustee, debtor is in error. The trustee could **not** have moved
25 to assume the lease (assuming debtor had timely identified it in Schedule G) in the first 60 days
26 of the case. The trustee was not appointed until September 24, 2003, providing less than 30 days
27 to discover the lease, decide it would be an estate benefit and acquire the financial resources to
cure arrearages to allow assumption, or request an extension of time to assume or reject. Dkt. 16-
17, 167 at p.3.

1 led to dismissal of the bankruptcy on September 19, 2003. Dkt. 13. The case was reinstated and
2 a trustee was ordered to be appointed on September 22, 2003. Dkts. 15, 25.

3 It's unclear what the fuss is about. It appears debtor understands the lease cannot
4 be assumed, since no one timely filed an assumption motion. Motion at 15. So there is no
5 possibility his motion for reconsideration could be legally granted. The order also made clear:
6 "It's unknown whether anyone is at fault in the lease rejection." Dkt. 167 at P.3. It is an article
7 of faith with debtor that the trustee knew/should have known about the existence of the business
8 lease. Motion at 9, 11-16. Fine. Trustee certainly did not file an assumption or extension motion
9 during the fewer than 30 days left. Debtor likewise didn't file such motions during the initial 30
10 days when he was the debtor in possession. During this time, it was **debtor's** responsibility to
11 monitor and timely assume or reject business leases. 11 U.S.C. §1107 (a).

12 Would it have been wise to assume the California lease? Phrased differently, did
13 the loss of the lease hurt creditors? None objected. The lease's value to the estate is unknown, but
14 apparently was of little value to the Phoenix-based trustee. His December 3, 2003 Schedule G
15 indicates his plan was "...to move out of the office the end of the year or no later than the first
16 quarter of 2004." Schedule G, dkt. 54. Apparently this didn't happen. The landlord subsequently
17 complained no rent had been paid since June of 2004, although debtor continued to occupy the
18 premises. This is well after the period when the trustee announced he would surrender the lease.
19 Minutes of December 6, 2004 hearing, dkt. 161. *Also see* landlord's motion to compel assumption
20 or rejection at p. 2, dkt. 145.³ These rent arrearages would have to be paid, to allow assumption.
21 11 U.S.C. §365 (b) (1).

22 It's unknown if the estate at that time had sufficient cash to pay back rent. It's
23 equally unknown whether assumption of this lease by the estate would have been a good business
24 decision. According to the landlord, it was the debtor who had been occupying the premises, as
25

26 ³The landlord also agrees that debtor did not list the lease in his bankruptcy schedules
27 or statements. Motion, *id*, at p. 2.

1 a month to month tenant, until defaulting. Dkt. 145, *id.* Any timely motion must establish the
2 benefit to the estate and creditors, not just to the debtor, to use estate money for lease assumption.
3 This is because, when serving as the estate representative, debtors in possession and trustees owe
4 a fiduciary duty to creditors and the estate to conserve assets and maximize creditor recoveries.
5 *Kalyna v. Swaine (In re Accomazzo)*, 226 B.R. 426, 429 (D. Az. 1998), §1107 (a) *id.* No such
6 motion was filed. Accordingly there's no showing in the record that rejection damaged the estate
7 at all, much less that the trustee bears more "fault" than does debtor.

8 The order denying debtor's motion for reconsideration is not a basis for recusal.

9 **DEBTOR'S SUIT AGAINST THE TRUSTEE AND TRUSTEE'S COUNSEL**

10 Debtor filed an adversary complaint to *inter alia*, remove the case trustee and
11 trustee's attorney. Adversary proceeding 05-00735. He now argues the court was intentionally
12 misleading in dismissing counsel from the litigation. Motion at 20.⁴ Debtor appears to argue that
13 by order of October 18, 2005 debtor was allowed to sue trustee and his counsel. Thereafter
14 counsel was dismissed from suit. Debtor ascribes this result to bias. *Id.* The court's ruling and
15 reasons were announced at the January 12, 2006 hearing. Adversary ("adv.") Dkts. 16-17, 19. The
16 matter is under appeal by debtor. Adv. dkt. 20.

17 The October order states in part:

18 3.) The September 28 order required issuance of
19 three summons, based on debtor's identification of
20 three defendants in his caption: the trustee,
21 trustee's counsel and counsel's law firm... If debtor
22 now wishes to proceed solely against the trustee
23 and counsel in their individual capacity, then
24 only two summons and complaints need be served.
25 Adv. dkt. 6, pgs. 2-3.

26 The earlier September 28 order attempted to cure certain of the *pro se*
27 complaint's deficiencies. It dismissed *sua sponte*, a corporation and the bankruptcy estate as
28

26 ⁴He also asserts, without any supporting evidentiary foundation that counsel is a personal
27 and very close friend of the court. *Id.* As to the latter accusation, while both counsel and debtor
28 may well be fine fellows, neither are counted among the court's few friends.

1 plaintiffs, (given debtor's lack of standing to represent them). It also dismissed all employees of
2 counsel's firm, as fictitious defendants and authorized issuance of three summons and complaint
3 copies for service by debtor on the three remaining defendants he identified. Adv. dkt. 2, at pgs.
4 1-2.

5 The notion that a court can subsequently dismiss parties initially permitted to be
6 named as defendants is not a "...complete reckless abandonment of [the court's] instructions
7 throughout the case." Recusal motion at 21.

8 Indeed, the court specifically noted in the September 28, 2005 order:

9 Certainly the 70 page complaint is not "... a short
10 and plain statement of the claim showing that the
11 pleader is entitled to relief..." Rule 8 (a) (2),
12 *F.R.Civ. P.* The pleading is also internally
13 inconsistent. *See* complaint at 3 (emphasizing that
the pleading is not an adversary complaint). These
and other pleading issues can be addressed, if
necessary, through subsequent motion practice.
Order at 1, fn. 1. Dkt. 246.

14 In fact, pleading issues were soon addressed in a motion to dismiss by defendants.
15 Dkts. 8-10. A briefing order was entered and oral argument scheduled. At the hearing, the court
16 provided debtor, who failed to file a written response, an additional opportunity to respond.
17 Minutes of January 12, 2006, adv. dkt. 17, hearing transcript at pgs. 34-35, adv. dkt. 16. However,
18 the court also noted:

19 One issue that I think I can dispose of right now
20 is whether to dismiss the Collins Law Firm as a
21 defendant. Given that debtor's complaint focuses
22 only on removal of the trustee and the trustee's
23 counsel, I think Mr. Collins' firm should be
24 dismissed, because the firm is not a proper party to
such a claim; see a Nevada case in re Davis 312
BR 681 at 690 [*sic*]. Instead, as I'm going to note
in just a minute, Section 324A of Title 11 applies
only to trustees.
Transcript, *id.* at pgs. 35-36.

25 The court subsequently entered an order that dismissed not just the law firm, but
26 counsel as well—clearly a sore point with debtor as noted on p. 21 of his motion and presumably
27

1 in his pending appeal. Order of January 24, 2006, adv. dkt. 19. While it's a pity the rapidly aging
2 trial judge referred only to the law firm and not specifically to attorney Collins in the transcript,
3 the legal reason for dismissal of both counsel and his firm are identical: "...the Trustee's Attorney
4 is not a proper party to such a claim and will be dismissed from the proceeding." *Lisowski v.*
5 *Davis (In re Davis)*, 312 B.R. 681, 690 (Bankr. D. Nev. 2004). The reason for this result in an
6 11 U.S.C. §324 (a) action is that if debtor succeeds in removing the trustee, counsel's removal
7 is automatic: "If the Trustee is removed, the successor trustee will be free to employ the attorney
8 of his or her choice." 312 B.R. at 690. No prejudice to plaintiff debtor results from the dismissal.
9 As the trustee's agent, relevant acts of counsel can be attributed to the trustee in the removal
10 litigation.

11 Following established case law in dismissing counsel and his firm from debtor's
12 adversary is not a basis for recusal.

13 STEPPING ASIDE AS TRIAL JUDGE AS A POTENTIAL WITNESS

14 Debtor asserts the court must recuse itself because debtor filed a witness list
15 identifying the judge as a witness in adversary 05-00243⁵. This adversary was brought by the
16 trustee seeking denial of debtor's discharge pursuant to 11 U.S.C. §727 (a). Complaint at adv. dkt.

17 1. Debtor has big plans for the court:

18 Judge Nielsen will become the Debtor's most
19 important witness, and we be [*sic*] voir dired as to
20 his expert knowledge as a Bankruptcy Judge and
21 an expert on Bankruptcy Law-then, this Debtor is
22 going to have Nielsen's lunch, treating him as an
23 adversarial and hostile witness. Mr. Nielsen will be
24 on the stand for weeks, eight hours per day. Judge
25 Nielsen will find that the docket he controls, and
26 his own words and Orders will come back to haunt
27 him-for the rest of his life.

28 Vindication will be the Debtor's solace in this
sordid affair of wrong doing by Judge Nielsen.

26 ⁵Actually debtor didn't file a witness list. However, he did identify the judge and others
27 as his witnesses in a discovery motion, which the plaintiff trustee filed as debtor's witness list.
28 Adv. dkt. 14.

1 Motion at 23.

2 The assertion that the court is "...Debtor's most important witness..." in defending
3 his right to a bankruptcy discharge is cited without factual basis or authority. It is **debtor's**
4 alleged wrong doing that is the focus of the trustee's complaint. *See* adversary complaint at first
5 cause of action, alleging debtor intentionally hindered or delayed the trustee in liquidation of the
6 Selleck note, second cause of action alleging a refusal to testify, third, fourth and fifth causes of
7 action alleging failure or refusal to keep, maintain or provide certain pre-petition business
8 records. Adv. dkt. 1. At trial, if plaintiff establishes a *prima facie* case, debtor must then explain
9 his out of court actions or non actions, not indict others. The court was not a witness to these
10 matters and has no knowledge of any facts relevant to this adversary, outside of those in the
11 record . *See U.S. v. Kanahele*, 951 F. Supp. 928, 944-45 (D. Haw. 1996) (District Judge denies
12 recusal when he was not a witness to any facts not already within the record).

13 A litigant cannot manufacture a conflict of interest as a source of recusal bias.
14 It must actually be likely that the judge will be called upon to evaluate the judge's own testimony
15 to prompt disqualification. Unsubstantiated speculation that the jurist will be required to be a
16 material witness concerning a disputed issue is insufficient to require recusal. *U.S. v. Salemm*,
17 164 F. Supp 2d 49, 78 (D. Mass. 1998). An allegation that a judge may be a material witness
18 does not automatically require disqualification. *Kanahele, id.* at 945. Since there is no showing
19 this court was a witness to relevant facts outside of the record, there are no grounds for recusal
20 merely because debtor announces an intention to call him as a witness.

21 **THE ORDER OF OCTOBER 19, 2004**

22 On October 19 of 2004, the court entered the following order in the
23 administrative bankruptcy file:

24 Enough. Debtor's attempted filings of October
25 15 continue his practice of unfocused, abusive and
26 profane papers, coupled with the occasional veiled
threat of physical harm. His abuse is principally on
the trustee and counsel, who are attempting to

1 finish projects debtor started and pay creditors he
2 didn't.

3 Although debtor purports to be detecting crimes,
4 he refuses to meet with law enforcement officers,
5 whom he also threatens. He complains about court
6 rulings, but never prosecutes an appeal. Most
7 importantly, debtor never appears in Court to offer
8 evidence in support of his allegations and subject
9 himself to cross examination. Nothing is served by
10 his sad exercise.

11 The court is specifically empowered, on motion
12 or its own initiative, to protect against scandalous
13 or defamatory material that arises during a
14 bankruptcy. Rule 9018, *F.Br.R.* Persons within the
15 court's jurisdiction should not be subject to
16 scandalous or defamatory material, submitted
17 under the guise of a properly pled and supported
18 court document. Every court has supervisory
19 power over its own records and files. Access has
20 been denied where court files might have become
21 a vehicle for improper purposes. Courts refuse to
22 permit their files to serve as reservoirs of libelous
23 statements. *Phar-Mor Inc. v. Defendants named*
24 *under seal*, 191 B.R. 675, 678-80 (Bankr. N.D. Oh.
25 1995).

26 The instant papers will not be filed by the clerk,
27 as either legal pleadings or legitimate
28 correspondence. In reality they are neither. The
papers are struck and will be discarded. All further
pleadings by debtor will meet the standard
imposed on all parties to this case: stating with
particularity
the relief requested and the legal and factual
support for entitlement to the relief. Rule 9013.
Hearings will be conducted on properly constituted
motions. Rule 9014. Papers not meeting this
standard will be struck and discarded.
Order at dkt. 143, administrative bankruptcy file
03-14674.

Subsequent to this order, debtor filed an acceptable pleading that was allowed.
Dkt. 147. On November 15 of 2004, the court struck an unacceptable pleading and an *ex parte*
letter, but allowed the filing of a second motion. Order at dkt. 158. Debtor's motion for
reconsideration was allowed to be filed on December 13, 2004. Dkt. 166. An attempted *ex parte*
contact with the court by debtor was refused on March 22, 2005. Dkt. 199. Debtor's affidavit was

1 allowed to be filed on April 4, 2005. Dkt. 208. Additional pleadings of debtor have been allowed,
2 when they met the requirements of the October order. *See* dkt. 230. The same procedure applies
3 to the pending adversaries, when debtor files an acceptable pleading, it is allowed. *See e.g.* order
4 of February 28, 2006 at p. 2 in adversary 05-00243. Adv. dkt. 25.

5 Debtor argues:

6 Actions have already been taken to hide the
7 mismanagement, the bias, the embarrassment of
8 Judge Nielsen. He has refused to file accurate and
9 truthful motions of the Debtor - stating they are
10 defamatory or slanderous. Sorry, allegations in
11 themselves are always defamatory and slanderous,
12 except when they are backed up by the truth. This
13 Debtor's motions have been, and still are true, and
14 yet, Judge Nielsen, in an unprecedented bias
15 against the Debtor, has refused to file them out of
16 embarrassment for him.
17 Motion at 23.

18 The October order was entered only after debtor's own writings⁶ made it
19 necessary to do so. The order amply describes the reason for the action. The sanction is no
20 broader than needed: when debtor files pleadings lacking vituperative, profane personal attacks
21 on parties, they are filed. He's been reminded of this in court. Transcript of April 4, 2005 at pgs.
22 17-24. Dkt. 215. Recusal on this basis is denied.

23 CONCLUSION AND ORDER

24 The recusal motion is denied. Debtor's arguments focus on rulings that are
25 supported by the facts and the law and are not the result of bias. A judge is not disqualified by
26 a litigant's intemperate and scurrilous attacks upon the court. *U.S. v. Studley*, 783 F. 2d 934, 940
27 (9th Cir. 1986). This is not the first time the court has dealt with challenging litigation
28 circumstances. *In re Jansen*, 107 B.R. 249 (Bankr. D. Az. 1989). This is not the first judge to
receive intemperate personal attacks from this party. *See* dkt. 14 (Three page *ad hominem* attack
on the domestic relations judge hearing debtor's pending divorce).

26 ⁶A pretty good argument could be made that the court should have acted sooner. *See*
27 dkts. 14, 127, 139-140, administrative bankruptcy file.

1 The court will continue to bear in mind that illness may be complicating the
2 situation.⁷ Relatively late in life, debtor is confronted with the loss of his business, loss of his
3 marriage and ill health. These are difficult circumstances. The court is sympathetic. Sympathy,
4 however, cannot justify abuse of others or of the legal process. Sympathy cannot permit delay or
5 denial of the trustee's right to have his complaint heard in trial. The recusal motion is denied.

6 The above has sufficiently quoted portions of debtor's motion to allow an
7 understanding of its tone and lack of evidentiary support. In addition, the motion charges a party
8 with knowingly operating "...a RICCO enterprise...." *Id.* at p. 3. It declares a party "...can only
9 be compared with Osama Bin Laden, dangerous, cunning, evil, prejudicial, biased, a criminal, a
10 terrorist, and, [*sic*] and, what will be proven before this fight is over, a killer....more
11 dangerous than all of Al Quida put together." *Id.* at 4. "For the Debtor to list every time...lies,
12 perjures himself..." *Id.* at p. 19. The pleading fails to meet the standard of the order of October
13 19, 2004. It will not be filed, but will be discarded.

14 **ORDERED ACCORDINGLY.**

15 

16 GEORGE B. NIELSEN, JR.
17 UNITED STATES BANKRUPTCY JUDGE
18

19
20 Copies mailed this 5th
day of April, 2006, to:

21 Daniel P. Collins
22 COLLINS, MAY, POTENZA, BARAN & GILLESPIE
23 2210 Bank One Center
24 201 N. Central Avenue
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26 Attorney for David A. Birdsell
27

28 ⁷Transcript of May 6, 2005 at debtor's statement, pgs. 16-19, Adv. dkt. 7 of Adv. 05-00243.

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By /s/Rachael M. Stapleton
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